163 US 342

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 267.

SAMUEL G. HILBORN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 25, 1893.

(15,383.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 19, 1895.

1 I.—*Preliminary Petition.*

In the Court of Claims, December Term, 1888.

SAMUEL G. HILBORN
vs.
THE UNITED STATES. } No. 16666. Filed Oct. 16, 1889. J. R.

Petition.

To the honorable the Court of Claims:

The claimant, Samuel G. Hilborn, respectfully represents:

1. That he was duly appointed and commissioned United States district attorney for the district of California and served in such office from on or about the first day of January, eighteen hundred and eighty-three, until on or about the fifteenth day of November, eighteen hundred and eighty-six; that during said period he faithfully performed the duties of said office and was also employed and retained by the Attorney General of the United States for many other duties outside of his official duties as district attorney aforesaid; that from time to time, as required by law, he prepared his accounts for services rendered the United States; that the same were duly approved by the United States district judge, to whom the same were submitted, and were forwarded to the United States Treasury Department; that numerous items of said accounts were disallowed by the Treasury Department upon various grounds not warranted by law; that petitioner cannot now state with particularity the items so disallowed, but avers that among them were many items for services rendered by direction of the Attorney Gen-
2 eral in connection with various *habeas corpus* cases of Chinamen desiring to enter this country; that the total of the items so disallowed is in the vicinity of seven thousand dollars, more or less; that on account of the papers upon which this claim is based being filed in the Treasury Department the petitioner prays leave to file this preliminary petition under rule 8 and asks that the motion for call upon the Treasury Department filed herewith be allowed, and thereafter he will file a precise petition setting forth the exact amount which he claims.

No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim or of any part thereof or interest therein has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as

stated in this petition to be true, and the claimant claims ten thousand dollars.

(Signed) CHARLES & WILLIAM B. KING,
Attorneys for Claimant.

Samuel G. Hilborn, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true to the best of my knowledge
3 and belief.

(Signed) SAMUEL G. HILBORN.

Subscribed and sworn to before me this 15th day of October, 1889.

(Signed) MYER COHEN,
Notary Public.
[SEAL.]

4 II.—*General Traverse.*

Filed May 3, 1890.

In the Court of Claims of the United States, December Term, A. D. 1889.

SAMUEL G. HILBORN
vs.
THE UNITED STATES. } No. 16666.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

(Signed) JOHN B. COTTON,
Assistant Attorney General.

5 III.—*Amended Petition.*

In the Court of Claims, December Term, 1890.

SAMUEL G. HILBORN
vs.
THE UNITED STATES. } No. 16666.

Second Amended Petition. Filed November 7, 1891.

Second amended petition filed by leave of court.

To the honorable the Court of Claims:

The claimant, Samuel G. Hilborn, a citizen of the United States, and resident of the State of California, respectfully represents:

I. That for and during the period from the 1st of February, 1883, to the 29th of November, 1886, the claimant held and exercised the office of attorney for the United States in the district of California, having been duly commissioned for that purpose by the President of the United States.

That during the time aforesaid claimant, as attorney aforesaid, prosecuted before the district court of California aforesaid, certain indictments for crimes committed against the United States, and the same were tried before a jury in said court and conviction had therein, and that said court did tax and allow to this claimant, in addition to all other allowances by law, the sum of $30, as a counsel fee in each of said cases (under sections 823 and 824, R. S.), and that said cases were, as designated by the numbers thereof on the docket of said court, as follows, to wit: 1574, 1667, 1676, 1677, 1678, 1684, 1675, 1695, 1690, 1696, 1770, 1764, 1765, 1720, 1717, 1731, 1730, 1798, 1869, 1880, and 1869.

That the accounting officers of the Treasury have assumed to adjust said account of this claimant, and in the settlement and adjustment thereof have refused to allow to this claimant certain sums of money, being part of the said counsel fees so taxed and allowed by said court, and payment thereof has been refused by the defendant, which reductions were as follows:

In certificate No. 80331, covering services from February 1 to March 30, 1883, the said sum of $30 was reduced to $15 in 1574, and to $10 in 1667, 1676, 1677, 1678, 1684, 1675, 1695, 1690, and 1696, being a reduction of $195

In certificate No. 83228, from April 1 to June 30, 1883, the said sum of $30 was reduced to $10 in 1720, 1717, 1731, and 1730, being a reduction of $80.

In certificate No. 82579, from July 1 to September 29, 1883, the sum of $30 was reduced to $15 in 1770, 1764, and 1765, being a reduction of $45.

6 In certificate No. 84259, from October 1 to December 31, 1883, the said sum of $30 was reduced to $10 in 1798, being a reduction of $20.

In certificate No. 86984, from January 31 to June 30, 1884, the said — of $30 was reduced to $10 in 1869, being a reduction of $20.

In certificate No. 88355, from July 1 to September 30, 1884, the said sum of $30 was reduced to $10 in 1880, being a reduction of $20.

In certificate No. 91250, from January 3 to March 31, 1885, the said sum of $30 was reduced to $10 in 1869, being a reduction of $20.

That said sums of money as aforesaid withheld from this claimant amount in the aggregate to the sum of $400.

That said reductions were made by the accounting officers of the Treasury upon the recommendation of the Attorney General, whereas this claimant is advised and believes that the taxation and allowance of the sum of $30 in each of said cases by said court was in

law final and conclusive, and no authority of law existed for the reduction of the amount thereof.

II. Claimant further states that as such attorney he, from April 1 to June 30, 1886, prosecuted in the said district court of California three indictments for crimes against the United States in cases numbered 2248, 2270, and 2262, and that in the said first-mentioned case there were two trials before juries, and in each of the other cases so named one such trial, and that the said court taxed and allowed to this claimant in the said cases docket fees for each trial, namely, two fees of $20 each, in case numbered 2248, and a like docket fee of $20 in each of the cases numbered 2270 and 2262 (under sections 823 and 824, R. S.). That said accounting officers of the Treasury, by certificate 98230, have refused to allow to this claimant in the settlement of his account the said several sums aforesaid, and have thus withheld from this claimant the sum of $80.

III. That as such district attorney, claimant, from October 1 to December 31, 1883, prosecuted indictments against Frank Collins, W. H. Goodell, and F. A. Dow for crimes against the United States severally committed by them. That to the indictment against Collins a *nolle prosequi* was entered, and the sum of $5 taxed therefor by said court. That in the case against Goodell there was a trial by jury and a docket fee of $20 was taxed therefor by said court; also that the case against Dow was tried summarily and the defendant acquitted, and the sum of $10 taxed by said court as a fee therein; that such taxations were made under sections 823 and 824, Revised Statutes. That the said accounting officers have refused, by certificate 84259, to allow this claimant said last-mentioned sums amounting in the aggregate to $35.

7 IV. That said claimant, as such district attorney, from October 1 to December 31, 1885, prosecuted an indictment for crime against the United States against E. G. Johnson, and the cause was tried before a jury and said jury disagreed, and a docket fee of $20 was taxed by the court to this claimant (under sections 823 and 824, R. S.), which has been disallowed and payment refused, by certificate 94999; that this claimant, as district attorney aforesaid, during the same time last aforesaid, prosecuted an indictment for crime against the United States against one Copper Kettle, and there was a trial therein by jury, but the jury disagreed, and the court taxed a docket fee of $20 to this claimant (under sections 823 and 824, R. S.), which has also been refused to this claimant, by the same certificate; that this claimant, as such district attorney, during the time last aforesaid, prosecuted an indictment for crime against the United States against R. Mickel, that was tried before a jury, and a trial fee of $20 taxed by the court (under sections 823 and 824, R. S.), which has been refused to this claimant by the same certificate; also that this claimant, as such district attorney, during the time last aforesaid, prosecuted an indictment for crime against the United States against W. T. Sellick and others, in which a jury trial was had, and the court taxed a trial fee to this claimant of $10 (under sections 823 and 824, R. S.), which has been refused to this

claimant, under the same certificate. That all of the sums mentioned in this paragraph, amounting to $70, have been withheld from this claimant, being rejected in the settlement of his accounts.

V. That as said attorney, this claimant, from January 1 to March 31, 1886, prosecuted in the district court aforesaid an indictment for crime against the United States against —— Johnson, and there was judgment therein without a trial by jury, and said court has taxed and allowed to this claimant as a fee therein the sum of $10, under sections 823 and 824, R. S., which the defendant has withheld and refuses to pay. (Cert. 96567.)

VI. That this claimant, while attorney as aforesaid, was specially employed by the Attorney General, at the request of the Secretary of the Treasury, to appear, and appeared, to defend against certain writs of *habeas corpus* brought by subjects of China against masters of vessels by whom they were detained, the collector of the port of San Francisco having refused to permit them to land; that said cases were concluded by a judgment at law rendered without a jury, and the sum of $10 was taxed in each of said cases by the said court as a fee to this claimant as such attorney, and that the several sums so taxed and allowed to this claimant were as follows:

For services rendered from October 15, 1883, to March 31, 1884, the said court taxed and allowed to this claimant the sum of
8 $3,810; out of which sum the defendant has withheld from this claimant the sum of $2,310, and refuses to pay the same. (Cert. 86532.)

For services rendered from April 1 to June 30, 1884, the said court taxed and allowed to this claimant the sum of $150; out of which said defendant has withheld the sum of $50, and refuses to pay the same. (Cert. 89088.)

For services rendered from July 1 to September 30, 1884, the said court taxed and allowed to this claimant the sum of $2,000; out of which sum the defendant has withheld from this claimant the sum of $923, and refuses to pay the same. (Cert. 89081.)

For services rendered from October 1, 1884, to March 31, 1885, the said court taxed and allowed to this claimant the sum of $3,370; out of which sum the defendant has withheld from this claimant the sum of $2,270, and refuses to pay the same. (Cert. 91865.)

For services rendered from May 1 to June 30, 1885, the said court taxed and allowed to this claimant the sum of $910; out of which sum the defendant has withheld from this claimant the sum of $610, and refuses to pay the same. (Cert. 94090.)

For services rendered from July 1 to September 30, 1885, the said court taxed and allowed to this claimant the sum of $1,695; out of which sum the defendant has withheld the sum of $1,165, and refuses to pay the same. (Cert. 94086.)

For services rendered from October 1 to December 31, 1885, the said court taxed and allowed to this claimant the sum of $1,070; out of which sum the defendant has withheld the sum of $852, and refuses to pay the same. (Cert. 95418.)

For services rendered from January 1 to April 30, 1886, the said court taxed and allowed to this claimant the sum of $490; out of

which sum the defendant has withheld the sum of $290, and refuses to pay the same. (Cert. 97264.)

For services rendered from May 1 to August 31, 1886, the said court taxed and allowed to this claimant the sum of $1,220, out of which sum the defendant has withheld the sum of $780, and refuses to pay the same. (Cert. 98922.)

That in all the sums taxed and allowed, as above stated, the sum of $10, and no greater sum, was taxed in each case in which judgment had been rendered without a jury.

VII. That this claimant instituted and conducted a suit in the district court of said State under special employment by the Attorney General, and at the request of the Secretary of War, to restrain certain persons from diverting the course of the Sacramento river in said State, which was finally disposed of March 1, 1886, and the sum of $500 was thereupon awarded by said court to this
9 claimant as proper compensation on the 15th day of May, 1886, and which sum was a reasonable compensation therefor, and out of said sum the defendant has withheld from this claimant the sum of $480, and refuses to pay the same. (Cert. 97729.)

No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim, and the only person interested therein; and no assignment or transfer of this claim, or any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant asks judgment for $10,025.

CHARLES & WILLIAM B. KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys of the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 4th day of November, 1891.

[SEAL.] ADELAIDE M. HAMILTON,
Notary Public.

10 IV.—*Defendants' Counter-claim.*

Filed June 10, 1892.

In the Court of Claims, December Term, 1891.

SAMUEL G. HILBORN
v.
THE UNITED STATES. } No. 16666.

Counter-claim.

And now come the defendants, by the Attorney General, and say that the said Samuel G. Hilborn was indebted to the said defendants in the sum of nine hundred and thirty dollars lawful money of the United States before and at the time of the commencement of the suit, which said sum of money is still due and justly owing from the claimant to the said defendants; and for a more particular statement of said indebtedness defendants say that for and on account of the services mentioned in paragraphs VII, IX, and X of the petition the claimant has been erroneously and illegally allowed and paid by the accounting officers of the Treasury Department of the defendants the sum of nine hundred and thirty dollars in excess of the fees and compensation prescribed by law for said services, to wit, for said claimant's services:

1. In the suit against Pool, par. VII.....	$280 00
2. In the four suits mentioned in par. IX.....	320 00
3. In the suit against Surveyor Gen'l (par. X).....	330 00
	$930 00

Wherefore defendants pray judgment for said sum of $930 or else that said sum be set off against any demands of claimants of like amount that may be found due at the trial of this cause from the defendants to the claimants.

(Signed) JOHN B. COTTON,
Assistant Attorney General.

11 V–VI.—*Findings of Fact and Opinion.*

Filed Nov. 14, 1892.

Court of Claims.

SAMUEL G. HILLBORN
vs.
THE UNITED STATES. } No. 16666.

(Decided Nov. 14, 1892.)

Findings of Fact.

This case having been heard before the Court of Claims, the court upon the evidence finds the facts to be as follows:

I.

The claimant was a United States attorney in the State of California from February 1, 1883, to November 30, 1886.

II.

(1.) More than six years before filing the preliminary petition seventeen indictments for crimes were tried by him before juries and convictions had. In addition to the attorney's fees, otherwise provided for, there was allowed to him by the court prior to September 30, 1883, under Rev. Stat., sec. 824 a counsel fee, in proportion to the importance and difficulty of the cause, of $30 in each case, amounting to $510. The Attorney General and the accounting officers reduced the amount in four cases to $15 each, and in thirteen cases to $10, and the claimant was paid $190 and no more.

(2.) December 31, 1883, in a like case, a $30 counsel fee was allowed him by the court, which was similarly reduced to $15, which was so paid to him.

III.

In like manner, between June 30, 1884, and April 3, 1885 (within six years before filing the first amended petition), the claimant tried before juries three indictments for crimes, in which convictions were had; and there was allowed to him by the court (under said section) a counsel fee, in proportion to the importance and difficulty of the cause, of $30 in each case, amounting to $90. The Attorney General and the accounting officers reduced the amount in each case to $10, and he was paid $30 and no more.

IV.

One hundred and ninety-five dollars are claimed in cases in which the action of the court and of the accounting officers is shown by the following table, which correctly states the form of action, parties, taxation, and grounds alleged for disallowance in each case:

Form of action.	Parties.	Fees taxed.	Remarks by the accounting officer.
1. Indictment...	U. S. *v.* Collins *(a)*.....	$5 00	Payment suspended on recommendation of the Attorney General, the fees appearing to be prohibited by sections 980 and 1024 Rev. Stat.
2. Do. ...	U. S. *v.* Goodell *(b)*.....	20 00	
3. Do. ...	U. S. *v.* Dow *(c)*.....	10 00	
4. Do. ...	U. S. *v.* Johnson.....	20 00	Disallowed because cases were not finally disposed of, jury having failed to agree.
5. Information..	U. S. *v.* One Copper Kettle.	20 00	
6. Indictment....	U. S. *v.* Sellick *et al* ...	10 00	Disallowed because judgment was rendered in favor of one defendant and the case was not finally disposed of as to the others.
7. Civil suit.....	U. S. *v.* Mickel *(h)*.....	20 00	The suit was brought to recover taxes due on cigars. The court taxed a docket fee of $20 for the services of the district attorney, which the accounting officer disallowed, because section 825, Rev. Stat., prescribes commissions at 2 per cent. of the moneys realized on the judgment in lieu of all costs and fees.
8. Indictment...	U. S. *v.* George A. Johnson *(d)*.	10 00	Disallowed as "not authorized."
9. Do. ...	U. S. *v.* Parura & Paris.	20 00	Disallowed because the jury failed to agree; hence there was no "trial" or final disposition of the cases.
	Same	20 00	
10. Do. ...	U. S. *v.* Curtin *(f)*.....	20 00	
11. Do. ...	U. S. *v.* O'Keefe *(g)*....	20 00	

(*a*.) There were two cases *v.* Frank Collins, the first for "disobedience of lawful commands, American steamer Iroquois," etc. In this case a *nolle pros.* was entered and docket fee of $5 charged. The charge in the second case is "neglecting to obey commands," etc., upon which a conviction was had. The attorney was allowed a docket fee of $20 and a special counsel fee of $30.

(*b*.) The same report shows two cases *v.* Goodell, the charge being the same in each case, *i. e.*, "for inflicting cruel and unusual punishment on certain seamen," etc. In the first case a conviction was had, a docket fee of $20 and special counsel fee of $20 allowed. In the second case the defendant was acquitted, and a docket fee of $20 charged.

12 (*c*.) There were also two cases *v.* F. A. Dow, the charge in each case being the same as in cases *v.* Goodell. In the first case defendant was tried without jury and convicted, and a docket fee of $10 allowed. The second trial resulted in an acquittal.

It is the usual practice of this (First Comptroller's) office to make suspensions in such cases for information as to why not joined under sections 980 and 1024, Revised Statutes.

(*d*.) The services of the district attorney in the case *v.* George A. Johnson consisted in making argument upon application for removal of defendant to Arizona, where he had been indicted. The court made an order directing the surrender of defendant to the United States marshal for the district of Arizona. The charge of $10, docket fee, was disallowed for the reason that it is not a case in court.

(*e*.) In case of Salvadaro La Parura, alias Joseph Almont and Frank Paris, were defendants. Indictment charged with "having in possession, passing, etc., counterfeit United States notes," etc. The case was tried twice, April 17 and 27, 1886, the jury having disagreed each time. On the last-named date the attorney entered a "*nolle*" and the case went off the docket.

(*f*.) Case of D. Curtin. Charge: "Disobeying the lawful commands of the American steamer Mariposa," etc. Case consolidated with Nos 2271, 2272, 2273, 2274, 2275, and 2276, by order of court. Trial proceeded with on June 3d; lasted four days. Jury discharged, not being able to agree. Docket fee of $20 charged.

(*g*.) Case of Patrick O'Keefe. Charged with "having in possession counterfeit coin," etc. Tried June 11, 1886; jury discharged, not being able to agree.

(*h*.) Case *v.* Mickel. In this case the verdict was for defendant, consequently nothing realized, and no commissions could be allowed.

V.

(1.) The claimant appeared and resisted the proceedings in cases prosecuted in the proper court of the United States, wherein writs of *habeas corpus* had been issued on behalf of subjects of the Emperor of China to masters of certain vessels arriving at the port of San Francisco, by whom persons were detained under orders of the collector of said port acting under color of the authority of the act of Congress, of May 6, 1882, ch. 126 (1 Supp. to Rev. Stat., 2d ed., p. 342, and 22 Stat. L., 58), and act of July 5, 1884, ch. 220 (1 Supp. to Rev. Stat., 2d ed., p. 458). Judgment was rendered without a jury in each case.

(2.) For the services of claimant the judge, upon approving his accounts under the act of February 22, 1875 (1 Supp. to Rev. Stat., 2d ed., p. 65), taxed and allowed him an assimilated fee of $10 in

each case (except in eight cases), in the following form, according to section 299 of the Revised Statutes:

I do further certify that the sum of $10 in each of said cases is a just and reasonable compensation and proper allowance to said S. G. Hilborn, Esq., for the services performed therein; that the fee of $10 hereby allowed has been assimilated to such fee as is prescribed by section 824 of the Revised Statutes for similar services in cases in which the United States is a party and where judgment is rendered without a jury.

(3.) The amount taxed and allowed by the court and the deductions by the Attorney General and accounting officers appear in the following table:

Services from date to date.	Date of taxation and of approval of accounts.	Amount taxed.	Amount allowed and paid.	Amount deducted by Attorney General and accounting officers.
1. Feb. 19, 1883, to Mar. 31, 1884.	April 1, 1884	$3,810	$1,500	$2,310
2. April 1 to June 30, 1884.....	Nov. 19, 1884	3,720	100	2,643
3. July 1 to Sept. 30, 1884.....	Nov. 19, 1884		977	
4. Oct. 1, 1884, to March 31, 1885.	May 7, 1885	3,370	1,000	2,370
5. May 1 to June 30, 1885.....	Oct. 21, 1885	910	300	610
6. July 1 to Sept. 30, 1885.....	Oct. 21, 1885	1,695	530	1,165
7. Oct. 1 to Dec. 31, 1885.....	Jan. 23, 1886	1,070	218	852
		14,575	4,625	9,950

Of the cases in item (1) of the table in paragraph (3) four cases were tried and final judgments rendered during the period between February 19, 1883, and October 15, 1883; 372 cases were tried and final judgments rendered during the period between October 16, 1883, and March 19, 1884; and the remaining five cases were tried and final judgments rendered during the period between March 20, 1884, and March 31, 1884. Eight cases (included in items (2) and (3) of said table) were test cases contested by the claimant, and the judge taxed and allowed him $2,000 for his services in these cases.

The Attorney General reduced the amount of the whole account by the sum of $9,950, as, in his opinion, so much in excess of reasonable compensation for the services; the accounting officers adopted his reduction and claimant was paid the balance only.

VI.

The claimant was directed by the Attorney General upon the request of the Secretary of War, December 1, 1885, to represent the interests of the United States in a suit by the United States against Joseph Bound and some thirty other defendants in the circuit court of the United States for the district of California, to restrain the diversion of the Sacramento river. Said suit was filed on the 5th of January, 1886, and final decree was entered on the 1st of March,

1886. The compensation of claimant for services was fixed on the 15th of May, 1886, by the circuit judge, at $500, as reasonable and proper. The Attorney General approved the same for $200, and the accounting officers allowed $20, which has been paid, and no more.

13 *Counter-claim.*

(1.) In association with his predecessor in office the claimant defended an action of trespass brought by parties against the United States marshal of the northern district of California for ejecting them from a Government reservation without process of law. For this service the circuit court approved a joint account for $800 as just and reasonable, of which $400 was approved for the claimant, and $300 of the amount so approved was paid to him, on the approval of the Attorney General, out of the appropriation for fees of district attorneys for the fiscal years 1883 and 1885, to wit, $250 as earned in calendar year 1883 and $50 as earned in calendar year 1885, upon a separate account settled by the accounting officers March 14, 1885.

(2.) Claimant appeared in the United States circuit court in behalf of the United States surveyor general of California in a mandamus suit instituted to compel the latter to make a survey, and defended the suit by direction of the Attorney General upon the recommendation of the Secretary of the Interior.

For this service he rendered an account for $1,000, which the circuit court taxed and approved as just and reasonable. Of this sum, $650 was disallowed by the Attorney General, and the balance, $350, was approved by him and paid to claimant out of the appropriation for fees of district attorneys for the fiscal year 1884, upon a separate account settled by the accounting officers February 27, 1884.

(3.) Claimant's predecessor in office, by direction of the Attorney General, at the request of the Secretary of the Interior, instituted four suits in the United States circuit court to set aside patents for land. After claimant became district attorney he prosecuted the suits until they were dismissed on demurrer July 30, 1883 (United States *v.* White, 9 Sawyer, C. C. R., 125).

For this service claimant rendered an account for $500, which was approved by the circuit judge as reasonable and proper compensation, of which sum $400 was paid on the recommendation of the Attorney General out of the appropriation for fees of district attorneys for the fiscal year 1884 upon a separate account settled by the accounting officers December 7, 1883.

Opinion.

RICHARDSON, Ch. J., delivered the opinion of the court:

Several questions of law arise in this case and we shall consider them in the numerical order of the findings.

The claims in the second and third findings are for counsel fees of $30 in each case, allowed by the judge before whom the cases were

tried, under Revised Statutes, section 824, and which were reduced by the Attorney General and the accounting officers. The claimant denies the right of those officers to make the reduction, and sues for the amount deducted. This raises the question decided in favor of the claimant in Water's case (21 C. Cls. R., 30), and as that case was affirmed on appeal by the Supreme Court (133 U. S., 208) it is unnecessary to consider the subject further.

To the claims in the second finding the defendants further plead the statute of limitations (Rev. Stat., sec. 1069).

A rule of the court provides as follows:

8. When the claimant cannot state his case with the requisite particularity without an examination of papers in one of the executive departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim.

The court will thereupon call upon the proper department for such information or papers as it may deem necessary, and when the same are furnished the petition may be amended, and the amended petition shall be printed and filed, and may take the place of the original petition.

October 16, 1889, the claimant filed the following preliminary petition:

The claimant, Samuel G. Hilborn, respectfully represents:

That he was duly appointed and commissioned United States district attorney for the district of California and served in such office from, on, or about the first day of January, eighteen hundred and eighty-three, until on or about the fifteenth day of November, eighteen hundred and eighty-six.

That during said period he faithfully performed the duties of said office and was also employed and retained by the Attorney General of the United States for many other duties outside of his official duties as district attorney aforesaid.

That from time to time, as required by law, he prepared his accounts for services rendered the United States.

That the same was duly approved by the United States district judge to whom the same were submitted and were forwarded to the United States Treasury Department.

That numerous items of said accounts were disallowed by the Treasury Department upon various grounds not warranted by law.

14 That petitioner cannot now state with particularity the items so disallowed, but avers that among them were many items for services rendered by direction of the Attorney General in connection with various *habeas corpus* cases of Chinamen desiring to enter this country.

That the total of the items so disallowed is in the vicinity of seven thousand dollars more or less.

That on account of the papers upon which this claim is based being filed in the Treasury Department, the petitioner prays leave

to file this preliminary petition under rule 8, and asks that the motion for call upon the Treasury Department, filed herewith, be allowed, and thereafter he will file a precise petition setting forth the exact amount which he claims.

At the same time he made application for a call on the Treasury Department for "all accounts filed by the claimant while United States district attorney for the district of California," etc. In reply voluminous documents were returned to the court January 3, 1890. On March 20, 1890, the claimant's first amended petition was filed and contained the items set out in the third finding, all of which accrued more than six years before filing that amended petition, but not more than six years before filing the preliminary petition.

We are of opinion that the claimant saved his rights and stopped the running of the statute of limitations by filing his preliminary petition in accordance with the rule of court as to the item which accrued within six years before that date. The evidence, all documentary, was in possession of the defendants, and the petition designated the claims with sufficient definiteness to lay the foundation for this action. Within a reasonable time after the call was answered by the Treasury Department, the claimant, as the rule permits, filed an amended petition which relates back to the date of filing the preliminary petition. The claims, except those in the first paragraph which accrued more than six years before filing the preliminary petition, set out in findings II and III, must be allowed.

As to items of claim set out in finding IV, they may be grouped in three classes.

Numbers 4, 5, 9, 10, and 11 are cases which were tried by the claimant and the jury failed to agree. In these cases we are of opinion that the claimant is entitled to a docket fee of $20 in each case, under the first clause of Revised Statutes, section 824, which allows an attorney "on a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of $20." A conviction is not necessary to the allowance of this fee. The district attorney becomes entitled to it when he tries the case and submits the same to the jury. If a conviction follows the indictment and trial he may be allowed under the last clause of the same section, "in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding $30." It is the additional counsel fee and not the docket fee that depends upon conviction.

Number 6 was a case tried by the claimant against several defendants, of whom one was acquitted and the case was not finally disposed of as to the others. For the reasons just stated we hold that the docket fee was earned and that the claimant is entitled to payment.

Numbers 1, 2, and 3 were cases in which more than one indictment was found against the same person for charges which might have been joined under the provisions of Revised Statutes, section 1024. He has been paid one bill of cost for each two cases which

should have been joined and the following section of the Revised Statutes prohibits his being paid any more:

SEC. 980. When a district attorney prosecutes two or more indictments, suits, or proceedings which should be joined, he shall be paid but one bill of costs for all of them.

Number 7 was a civil suit for tax on cigars which resulted in a verdict for defendant. This charge of $20, docket fee, cannot be allowed. The statute makes the district attorney's compensation for trying such a case dependent upon the amount of moneys collected or realized "in lieu of all costs and fees," as appears by the following section of the Revised Statutes:

SEC. 825. There shall be taxed and paid to every district attorney two percentum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding.

15 Number 8 was a case of an application for the removal of a defendant to Arizona where he was under indictment, in which the claimant appeared and made an argument for granting the application, and the judge ordered the surrender of the defendant. These proceedings took place under the provisions of the Revised Statutes, section 1014, which enacts that they shall be "at the expense of the United States." If the district-attorney appears in such case, the most that he is entitled to charge is an assimilated fee under Revised Statutes, section 299, of $5 a day for each day of his necessary attendance allowed by Revised Statutes section 824. How many days he was in attendance does not appear, and one day only can therefore be allowed.

The next items of claim are set out in finding V, and the deductions by the accounting officers from claimant's accounts amount to $9,950. In each of the cases therein charged for the claimant is entitled to an assimilated fee of $10, under the provisions of the Revised Statutes, section 299, with reference to the taxable fees in similar cases under Revised Statutes, section 824, where that fee is allowed in cases at law when judgment is rendered without a jury.

In eight cases which were tried as tests the judge made an allowance to the claimant of $2,000 and the same is charged in the accounts set out in the table.

The Attorney General reduced the whole charge of $14,575 by $9,950, as, in his opinion, so much in excess of reasonable compensation for the services, and the accounting officers, following the action of the Attorney General, made the same deduction. This they had no power to do as to the assimilated fees. The fees of the district attorney are fixed by statute and are not subject to reduction by other officers.

On the other hand, the judge had no power to make an allowance of more than the assimilated fees in the eight cases in which he allowed $2,000.

The claimant's accounts must be corrected accordingly.

The sixth finding presents a case where the Attorney General directed the district attorney to prosecute an equity suit on behalf of

the United States in the United States circuit court. In such a case it was the official duty of the district attorney to represent the interests of the United States in the suit; and for the performance of that duty the fee bill allows a fee of $20, and nothing more. That fee has been paid to the claimant. (Smith's case, 26 Ct. Cls., 568.)

This brings us to the counter-claims in the seventh finding.

There are three of them, in which the judge, before whom the cases were prosecuted by the claimant, made certain allowances beyond the taxable costs. The Attorney General reduced the same and the accounting officers approved the reduced sums or made still further reductions, and the claimant was paid the final reduced amounts. The accounts for these charges were all settled and paid separately in the years 1883, 1884, and 1885, and are in no way connected with the claims set up in this case.

On the part of the defendants it is contended that, as matter of law, the claimant had no right to the compensation allowed beyond certain taxable fees and that the judge, the Attorney General, and the accounting officers were all wrong in passing the accounts and in authorizing the payments, whereby the claimant is liable to repay the amount which he has received in excess of his legal fees.

That money paid in mistake of law, as well as of fact, may sometimes be recovered back in an action for money had and received or on a plea of counter-claim by the United States is no doubt true (Ellsworth's case, 14 C. Cl. R., 394, 395, affirmed on appeal 101 U. S., 170; McElrath's case, 12 C. Cls. R., 201, 312, affirmed on appeal 102 U. S., 426).

The action of assumpsit for money had and received is said to be "an equitable remedy that lies in favor of one person against another when that other person has received money, either from the plaintiff himself or third person, under such circumstances that in equity and good conscience he ought not to retain the same, and which, *ex æquo et bono*, belongs to the plaintiff." (4 Waite's Actions and Defenses, 469.)

In the present case the claimant performed actual services for which he considered himself entitled by law to compensation; a United States judge was of the same opinion, and made allowances accordingly; the Attorney General of the United States conceded his right to compensation but reduced the allowances made by the judge, and the accounting officers passed the accounts with further deductions in some cases, and as finally reduced they were paid.

In our opinion, when money is paid, after careful consideration of the law and facts by such high officials, and upon settlements made by the accounting officers, it cannot be held that the district attorney received the money under such circumstances that in equity and good conscience he ought not to retain it, although it may appear that all those public officers were mistaken in their interpretation of the statutes and that he was not in law entitled to the compensation.

16 Attorney General Cushing, in an opinion given to the Secretary of the Interior in 1854 upon the accounts of a coroner of the District of Columbia, settled and paid upon an erro-

neous construction of the law, thus advised in relation to the reopening of the same:

That construction was manifestly against law. I do not recommend that the coroner be called upon to refund the money he has received. The Government has voluntarily paid it in its own wrong, and, perhaps, ought to submit to the loss. I am accustomed to advise acquiescence in what is done as done. (6 Op., 568.)

Accounts have sometimes been opened on the application of a party for the correction of a manifest error of law committed to his prejudice. But if one party insists upon having the accounts open to re-adjust them, in view of correcting errors committed to his prejudice, it would be right and the duty of the accounting officers to correct at the same time any error committed to the prejudice of the other party. The effect of this will be that if the accounts are reopened at the instance of the coroner the re-adjustment must be complete and legal in all its parts, and he may be called upon to account for the money which he has received unlawfully heretofore by the mistake of the Government. (6 Op., 576.)

It was on this latter ground that in the case of McElrath a judgment was rendered against him for money paid in mistake of law. He had been an officer of the navy, and was dismissed by an executive order which was subsequently revoked, and the revocation was held to be illegal. In the interval of some seven years between the two orders he had performed no service, and he claimed full pay as an officer *de jure* of about $12,000. The accounting officers, on some theory of the law, allowed him half pay which he accepted under protest and brought suit for the difference. The court held that he was not an officer of the navy during this time, and should not have been paid as such. As he had himself reopened the settlement by bringing suit he had invited a full re-adjustment of the account and judgment was given against him on the counter-claim for what he had received. (12 C. Cls. R., 201, 312; 102 U. S., 426.)

In other cases it has been held that where payments have been made upon settlements of the accounting officers for service actually rendered or for money actually paid, though not warranted by law, the money could not be recovered back if it had been received in good faith and the recipients acquiesced in the settlements and did not seek to reopen them. (Miller's case, 19 C. Cls. R., 354; Palen's case, 19 C. Cls. R., 394; Hartson's case, 21 C. Cls. R., 451.)

The claimant is not seeking to reopen his settlements. In his second amended petition, filed by leave of court, he omits the claims embraced in those accounts and thus acquiesces therein.

We hold that the settlements are equally binding upon the defendants, and that money paid thereon cannot be recovered back on the plea of counter-claim.

Upon the whole case the judgment of the court is that the counter-claim must be dismissed and that claimant is entitled to recover on—

Finding II (par. 2)	$15
Finding III	60
Finding IV	125
Finding V	8,030
Total	8,230

For that sum judgment will be rendered for claimant unless the maximum of $6,000 fixed by Revised Statutes, section 835, would be exceeded in any one year, in which case the judgment must be so much less. On that point no evidence has been presented, but as it is understood that the claimant's emolument returns will show that to be the case, judgment will be suspended until the accounts can be adjusted at the Treasury in conformity with this opinion.

17 VII–VIII.—*Additional Findings of Fact, Conclusion of Law, and Opinion.*

Court of Claims.

SAMUEL G. HILLBORN *vs.* THE UNITED STATES. } No. 16666.

Decided February 27, 1893.

Opinion.

RICHARDSON, *Ch. J.*, delivered the opinion of the court:

On the previous trial the court was of opinion that the claimant was entitled to the sum of $8,230 unless he would thereby receive more than the maximum of $6,000 a year fixed by Revised Statutes, section 835, which the court had no means before it of determining. (27 Ct. Cls., 547.)

Judgment was suspended until the accounts should be adjusted at the Treasury Department in accordance with the opinion. Since then the accounting officers have stated the accounts, which makes it necessary to add the following to the findings of fact:

VIII.

If the items for services set out in finding V are required by law to be included in the claimant's emolument returns, there would be due him $594.60 thereof in order to make up his maximum allowed by law at the rate of $6,000 a year as follows:

For the fraction of year ending December 31, 1883, by	$288 43	
For the year ending December 31, 1884	188 10	
For the year ending December 31, 1885	574 13	
		1,050 66
For the fraction of the year ending November 29, 1886, he has been overpaid		456 06
		594 60

If said items are not by law required to be included in his emolument returns then there would be due him $8,230.

Those items are specified in the findings of fact as follows:

V.

(1.) The claimant appeared and resisted the proceedings in cases prosecuted in the proper court of the United States, wherein writs of *habeas corpus* had been issued on behalf of subjects of the Emperor of China to masters of certain vessels arriving at the port of San Francisco, by whom persons were detained under orders of the collector of said port, acting under color of the authority of the act of Congress of May 6, 1882, ch. 126 (1 Supp. to Rev. Stat., 2d ed., p. 342, and 22 Stat. L., 58), and act of July 5, 1884, ch. 220 (1 Supp. to Rev. Stat., 2d ed., p. 458). Judgment was rendered without a jury in each case.

(2.) For the services of claimant the judge, upon approving his accounts under the act of February 22, 1875 (1 Supp. to Rev. Stat., 2d ed., p. 65), taxed and allowed him an assimilated fee of $10 in each case (except in eight cases), in the following form, according to section 299 of the Revised Statutes:

"I do further certify that the sum of $10 in each of said cases is a just and reasonable compensation and proper allowance to said S. G. Hillborn, Esq., for the services performed therein; that the fee of $10 hereby allowed has been assimilated to such fee as is prescribed by section 824 of the Revised Statutes for similar services in cases in which the United States is a party and where judgment is rendered without a jury."

(3.) The amount taxed and allowed by the court and the deductions by the Attorney General and accounting officers appear in the following table:

Services from date to date.	Date of taxation and of approval of accounts.	Amount taxed.	Amount allowed and paid.	Amount deducted by Attorney General and accounting officers.
1. Feb. 19, 1883, to Mar. 31, 1884.	Apr. 1, 1884	$3,810	$1,500	$2,310
2. Apr. 1 to June 30, 1884.....	Nov. 19, 1884	3,720	100	2,643
3. July 1 to Sept. 30, 1884.....	Do.		977	
4. Oct. 1, 1884, to Mar. 31, 1885.	May 7, 1885	3,370	1,000	2,370
5. May 1 to June 30, 1885.....	Oct. 21, 1885	910	300	610
6. July 1 to Sept. 30, 1885.....	Do.	1,695	530	1,165
7. Oct. 1 to Dec. 31, 1885.....	Jan. 23, 1886	1,070	218	852
		14,575	4,625	9,950

Of the cases in item 1 of the table in paragraph 3, four cases were tried and final judgments rendered during the period between February 19, 1883, and October 15, 1883; 372 cases were tried

and final judgments rendered during the period between
18 October 16, 1883, and March 19, 1884; and the remaining five cases were tried and final judgments rendered during the period between March 20, 1884, and March 31, 1884. Eight cases (included in items 2 and 3 of said table) were test cases contested by the claimant, and the judge taxed and allowed him $2,000 for his services in these cases.

The Attorney General reduced the amount of the whole account by the sum of $9,950, as, in his opinion, so much in excess of reasonable compensation for the services; the accounting officers adopted his reduction and claimant was paid the balance only.

On that finding, the opinion of the court was stated:

The next items of claim are set out in finding V, and the deductions by the accounting officers from claimant's accounts amount to $9,950. In each of the cases therein charged for, the claimant is entitled to an assimilated fee of $10, under the provisions of the Revised Statutes, section 299, with reference to the taxable fees in similar cases under Revised Statutes, section 824, where that fee is allowed in cases at law when judgment is rendered without a jury.

In eight cases which were tried as tests the judge made an allowance to the claimant of $2,000, and the same is charged in the accounts set out in the table.

The Attorney General reduced the whole charge of $14,575 by $9,950, as, in his opinion, so much in excess of reasonable compensation for the services, and the accounting officers, following the action of the Attorney General, made the same deduction. This they had no power to do as to the assimilated fees. The fees of the district attorney are fixed by statute and are not subject to reduction by other officers.

On the other hand, the judge had no power to make an allowance of more than the assimilated fees in the eight cases in which he allowed $2,000.

It is urged on the part of the claimant that—

"The only fees included by section 835 within the limitation of $6,000 are those which the district attorney 'is required to include in his emolument returns.' Section 834 defines what these fees are. After excluding fees allowed by sections 825 and 827 it directs the inclusion in the emolument returns of 'all other fees, charges, and emoluments to which a district attorney may be entitled, by reason of the discharge of the duties of his office as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein.'

If a fee is earned in a case falling within either of these two classes it must be included within the emolument return; if not, it need not be included."

The Revised Statutes prescribe what shall be included in the emolument returns.

SEC. 833. Every district attorney * * * shall, on the first days of January and July in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days,

respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act. * * * Said returns shall be verified by the oath of the officer making them.

SEC. 834. The preceding section shall not apply to the fees and compensation allowed to district attorneys by sections eight hundred and twenty-five and eight hundred and twenty-seven.

All other fees, charges, and emoluments to which a district attorney * * * may be entitled, by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge thereof, shall be included in the semi-annual return required of said officers by the preceding section.

The language of section 833, in terms, is broad enough to require in the return of "emoluments of his office, of every name and character," assimilated fees as well as fees directly prescribed by law. Assimilated fees are emoluments of his office.

The claimant's attorney contends that section 833 is modified and limited by the next succeeding section, so as to withdraw from its provisions not only the fees and compensation allowed by Revised Statutes, sections 825 and 827, as set out in the first period, but also all fees and emoluments except those to which a district attorney may be entitled "by reason of the discharge of the duties of his office as now or hereafter prescribed by law" or "in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court or any judge thereof."

The first part of the second period of section 834 is just as broad and extensive in its requirements, as to what shall be put into the emolument return, as is section 833, and the last part only adds, apparently for abundance of caution, that certain specified fees shall be included. These last-named fees were covered by section 833 and the first part of section 834, and it was wholly unnecessary to more specifically mention them. Stating them in that way does not change the more general provision of section 833 and the first part of the section 834.

This view is strengthened by an examination of the acts from which the sections, as reproduced in the Revised Statutes, were drawn (act of 1853, ch. 85, sec. 3; 10 Stat. L., 165; act of 1863, ch. 76, secs. 11, 12; 12 Stat. L., 741; act of 1864, ch. 163, sec. 2; 13 Stat. L., 196).

Judgment will be entered in favor of the claimant for the sum of $594.60.

19 IX.—*Final Judgment.*

In the Court of Claims.

SAMUEL G. HILBORN } No. 16666.
vs.
THE UNITED STATES. }

At a Court of Claims held in the city of Washington, D. C., on the 27th day of February, 1893, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises both for and against the Government and the claimant, find upon the whole case that there is due to the claimant the sum of $594.60, and do order, adjudge, and decree that the said Samuel G. Hilborn do have and recover of and from the United States the sum of five hundred and ninety-four $\frac{60}{100}$ dollars ($594.60), and the counter-claim of the defendants be dismissed.

20 X.—*Motion for Appeal.*

Filed May 25, 1893.

In the Court of Claims, December Term, 1892.

SAMUEL G. HILBORN } No. 16666.
vs.
THE UNITED STATES. }

Motion for appeal.

Now comes the claimant, Samuel G. Hilborn, by his attorneys, Charles King and William B. King, and gives notice of and makes application for an appeal from the judgment of this court rendered against the claimant and in favor of the defendants on the 27th day of February, 1893.

(Signed) CHARLES KING,
WILLIAM B. KING,
Attorneys for Claimant.

21 XI.—*Allowance of Appeal.*

In the Court of Claims.

SAMUEL G. HILBORN } No. 16666.
v.
THE UNITED STATES. }

MAY 25, 1893.

Mr. King, for the claimant, presented an application for the allowance of an appeal filed of this date and it was ordered that the appeal be allowed as prayed for.

22 In the Court of Claims.

SAMUEL G. HILBORN
vs.
THE UNITED STATES. } No. 16666.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the opinions of the court, of the final judgment of the court, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Washington, this 25th day of August, A. D. 1893.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Ch. Clerk Court of Claims.

Endorsed on cover: Case No. 15,383. Court of Claims. Term No., 267. Samuel G. Hilborn, appellant, *vs.* The United States. Filed August 25th, 1893.

Once Supreme Court U. S.
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JAMES H. MCKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 267.

SAMUEL G. HILBORN, *Appellant,*

v.

THE UNITED STATES.

Appeal From the Court of Claims.

Assignment of Error and Argument for Appellant.

CHARLES KING,
WILLIAM B. KING,
Attorneys for Appellant.

H. L. McQUEEN, PRINTER.

IN THE

Supreme Court of the United States.

October Term, 1895.

SAMUEL G. HILBORN, Appellant,
v.
THE UNITED STATES. } No. 267.

Appeal From the Court of Claims.

BRIEF FOR APPELLANT.

Statement of Case.

This is an appeal by the claimant from a judgment of the Court of Claims in favor of the United States in a suit for services rendered by the appellant, who was, at the time, United States Attorney in the State of California.

The facts, as found by the Court of Claims, so far as material to the present appeal, are as follows:

The claimant resisted certain writs of *habeas corpus* issued on behalf of subjects of the Emperor of China to masters of certain vessels at the port of San Francisco. In each case where judgment was rendered without a jury, the sum of $10 was taxed and allowed by the proper court (§824, Revised Statutes). Deductions were made by the Attorney-General and the accounting officers of the Treasury from this allowance, they fixing the amount due upon such basis as they thought reasonable. The court below held, as a matter of law, that the claimant was

entitled to an assimilated fee of $10 in each case, under the provisions of §299 Revised Statutes, and that the total amount earned by him and not paid was $8,230. But it was also held that this amount must be included by the District Attorney in his emolument return, provided for by §834 Revised Statutes, and must be counted in making up the maximum of $6,000 a year allowed him by §835. Judgment was rendered for the claimant for the difference between the amount actually received by him and his maximum during the several years covered by the claim, a total of $594.60, and for the United States for the remainder of the claim.

The claimant, but not the United States, appealed from this judgment. The sole question, therefore, presented for the consideration of this court is, whether the Court of Claims rightfully required the fees earned, as above, to be included in his emolument return and counted in his maximum compensation.

Assignment of Error.

For cause of error, the appellant says that the Court of Claims erred in holding that the fees earned by him in resisting writs of *habeas corpus* (assimilated as provided by §299 Revised Statutes), were to be included in his emolument return or counted in making up his maximum compensation, and that the judgment of the court should have been for the sum of $8,230.

Argument.

This case brings up for consideration the right of a District Attorney to certain fees from the United States in excess of his maximum fixed by law.

Section 833 R. S., directs the district attorney to make a written return on the first days of January and July of each year of all fees and emoluments of his office, and

of all the necessary expenses. Then follow these provisions:

"SEC. 834. The preceding section shall not apply to the fees and compensation allowed to district attorneys by sections eight hundred and twenty-five and eight hundred and twenty-seven. All other fees, charges, and emoluments to which a district attorney or a marshal may be entitled, by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge thereof, shall be included in the semi-annual return required of said officers by the preceding section."

Sections 825 and 827, referred to in the first part of this section, have no connection with this case.

"SEC. 835. No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year."

The only fees included by §835 within the limitation of $6,000 are those which the district attorney "is required to include in his emolument returns." §834 defines what these fees are. After excluding fees allowed by §§825 and 827, it directs the inclusion in the emolument returns of "all other fees, charges and emoluments to which a district attorney may be entitled, (1) by reason of the discharge of the duties of his office as now or hereafter prescribed by law, or (2) in any case in which the United States will be bound by the judgment rendered therein."

If a fee is earned in a case falling within either of these two classes it must be included within the emolument return; if not, it need not be included.

These cases are not cases "in which the United States will be bound by the judgment rendered therein." Are they cases the defense of which devolves on the district attorney "by reason of the discharge of the duties of his office prescribed by law"? To determine this we must ascertain the duties so prescribed. Section 771 R. S. is the only definition of these duties.

"SEC. 771. It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury."

If the work done by the district attorney in these cases is to be brought within this section, it must be embraced within his duty "to prosecute all civil actions in which the United States are concerned." In these cases, he did not prosecute, but defended. This word has a definite technical signification. Its use in this section in relation to criminal actions is in that precise technical sense. It would hardly seem proper to hold that its sense is different when governing its second object than that in which it is unmistakably used when governing its first object. If it is to include these *habeas corpus* cases, it must be defined as meaning "to prosecute and defend."

The reason why the duty of the district attorneys embraces only prosecution and not defense appears upon

examination of the statutes. The United States may sue, but could not, prior to March 3, 1887 (1 Supp. R. S., 559), be sued in a circuit or district court. To defend the United States, therefore, could never have been required. Officers of the United States might be sued and the United States might have an indirect interest in the defense of many suits, but the law only imposed upon the attorney the duty of prosecuting suits in which the United States was "concerned" as a party plaintiff. The duty of the district attorney as fixed by law was, therefore, to prosecute all civil demands of his client, the United States. Other services were not "prescribed by law." When rendered, the the amount to be paid is fixed by section 299, but not being "prescribed by law," the fees are not to be included in the emolument return.

This class of "unofficial fees" of district attorneys was recognized by executive practice and legislative approval (5 Lawrence Dec., 38, 46, 55). Such services were duly reported to Congress in Senate Executive Document 266, 50th Cong., 1st Sess., by the Attorney-General and an appropriation was made by Congress "For payment of United States district attorneys for unofficial services" by the act of October 19, 1888 (25 Stat. L., 583). One of the claims thus reported and paid was that of this appellant's successor for "services rendered in Chinese *habeas corpus* cases."

In the case of United States *v.* Bassett, 2 Story, 389, 402, Story, J., said:

"Besides; the act itself is restrictive of the right of the officers to all the fees and emoluments of their office, generally allowed by law, cutting down and limiting the compensation to a fixed maximum, and appropriating the residue to the public treasury. Now in such cases the general rule of interpretation is to give effect to the restriction and limitation, only so far as the legislature has clearly and positively spoken, since it is in derogation

of private rights otherwise vested in the incumbent in office. We can not and we ought not, in such a case, to say *Voluit, sed non dixit*; for the intention can be fitly gathered only from the words; and therefore it is but just to say, *Non voluit, quia non dixit.*"

That doctrine, thus declared, by so eminent an authority, is invoked in behalf of this appellant.

For these reasons, it is insisted that the court erred in requiring these fees to be included within the limited maximum and that judgment should be rendered for the full amount.

The reasons given by the court below for deciding that the claimant earned the full amount of $8,230 are so full and clear that even had not the defendants by failing to appeal, prevented themselves from raising any question on this point, it would be unnecessary to discuss it.

CHARLES KING,
WILLIAM B. KING,
Attorneys for Appellant.

FILED
MAY 1 18
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

SAMUEL G. HILBORN, APPELLANT,
v.
THE UNITED STATES, APPELLEE. } No. 267.

BRIEF FOR APPELLEE.

J. E. DODGE,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

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STATEMENT.

The only contention raised by the assignment of error in this case is whether or not the allowances made to the claimant as district attorney are to be considered as emoluments of his office, and therefore so much of them as exceed his maximum of $6,000 per year are to be withheld from him. The allowances involved in this question were made for the district attorney's services in defending something over twelve hundred habeas corpus proceedings to withdraw from the custody of masters of vessels certain Chinese immigrants whom the collector of the port had ordered detained by said masters. No showing of any special employment of the district attorney, either by the court or by the Attorney-General or

any other officer, is shown. Apparently his attention to the defense of these proceedings was voluntary. The amount allowed him by the Court of Claims was a docket fee of $10 in each case, in assimilation to the second paragraph of section 824, Revised Statutes, which allows the district attorney a docket fee "in cases at law when judgment is rendered without a jury, $10." The total amount of the allowances in these cases at that rate was $8,030, and as the total amount withheld from the district attorney as in excess of his maximum allowance was only $7,600, all of said excess consisted in this class of charges.

The claimant, to recover the amount so withheld, contend both, first, that the services so rendered were no part of his official duties; and, second, that he is not required to include in his emolument account that compensation which is accorded him by virtue of section 299 of the Revised Statutes.

ARGUMENT.

The question here presented is one of those decided adversely to the claimant in the case of *Smith* v. *United States* (158 U. S., 346) and the arguments urged in that case apply here.

Three propositions are contended for by the Government, each of which is fatal to claimant's recovery on this item:

1. The representing the Government in all suits to which it is a party or in which it is concerned is part of the official duty imposed on the district attorney by law.

2. Performance of any service not part of his official duty prior to 1888, gave no right to compensation from the Government, no one having authority to subject the latter to liability therefor.

3. The maximum personal compensation allowed a district attorney can not be increased by any extra allowances whatever except as expressly authorized by law.

First.

The services in the habeas corpus cases were official services, and it was the district attorney's official duty to perform them.

(1) The judiciary act of September 24, 1789, section 35 (1 Stat. L., 92; Rev. Stat., 359, 771), makes it the duty of the district attorneys in their respective districts to represent the Government in * * * "all civil actions in which the United States shall be concerned, except before the Supreme Court in the district in which that court shall be holden."

The judiciary act, it will be observed, did not prescribe a fee bill. It left the compensation of the attorneys to be measured by the fee bills of the State or county courts. But the "act to regulate processes in the courts of the United States," approved September 29, 1789, five days after the approval of the former act (1 Stat. L., 93), provided by section 2 that the "rates of fees, except fees to judges in the circuit and district courts, in suits at common law, shall be the same in each State, respectively, as are now allowed in the supreme court of the same;" and in causes of equity and maritime jurisdiction, that the

"rates of fees shall be the same as are, or were last, allowed by the States, respectively, in the court exercising supreme jurisdiction in such cases."

This rule was continued and enlarged by later acts (1 Stat. L., 123, 191, 216, 277, 625; 5 Stat. L., 427, 483), until the enactment of the fee bill of the act of February 26, 1853, which has been incorporated into the Revised Statutes.

In order to remove any uncertainty in the construction of the fee bill of 1853 as to whether suits to which the United States was not a party, though interested, whether in State or United States courts, fell within the duties of the district attorney, and his services therein were therefore to be compensated according to such fee bill, the act of August 16, 1856 (11 Stat., 49), now section 299, providing for assimilated fees, was passed. With reference to that statute Attorney-General Cushing, on February 27, 1857 (8 Op., p. 399), says:

> You referred to me on the 2d of March, 1855, a proposed circular, which involved questions as to the fees of district attorneys and requested my views thereon.
>
> The question was whether, when a district attorney appears under direction of the Secretary of the Treasury as counsel for a collector of customs in revenue cases, he is to be considered, in relation to the question of his official compensation, as appearing officially or whether unofficially, as on a special retainer? And so of other cases in which the Government might sue or defend as the real party in interest, without the suit being expressly in the name of the United States.

> My impression, suggested to you verbally at the time, was that the official duty of a district attorney cover such cases, at least when sued in the courts of the United States.
>
> We concurred, however, in thinking it well to refer the question to Congress, in order that it might be determined by a declaratory law rather than to place the decision on a ruling of the Attorney-General. That having been done by the act of August 16, 1856 (11 Stat. L., 49), it is unnecessary to argue the question upon its original merits.

That statute of 1856, as section 299, and the fee bill of 1853, as section 823, *et seq.*, have been brought into the Revised Statutes.

The duty of the district attorney is, therefore, generally defined as follows:

> SEC. 771. It shall be the duty of every district attorney to prosecute in his district * * * *all civil actions* in which the United States are concerned.

This language is the same used in 1789 and continuously since. Attorney-General Berrien, in 1830, held that it entitled the Government to services of a district attorney in "any case occurring in the courts of his district, whether State or Federal." (2 Op., 319.)

Attorney-General Cushing, in 1857 (8 Op., 399), so held again as to the official duty; and also held that the compensation, by virtue of the act of August 16, 1856 (now section 299), was to be, not *quantum meruit*, but in assimilation to the fee bill of 1853, and that the act of 1856 had removed any uncertainty as to whether such services were official.

Attorney-General Black, in 1858 (9 Op., 146), held that defense of actions against public officers for acts

done *virtute officii* was official duty imposed on district attorneys by law, and to be compensated only under the fee bill.

Attorney-General Bates, in 1863 (10 Op., 489), held that a suit in equity in the name of the United States to enjoin trespass on real estate was clearly within the words "all civil actions in which the United States shall be concerned," and therefore within the official duty of district attorneys, and to be compensated only under the fee bill.

Congress, in 1873, in enacting the Revised Statutes, adopted the existing provision as to duties of district attorneys, and the fee bill of 1853, as declared by the act of 1856, and thereby adopted the construction given them by the several Attorneys-General above quoted.

There can, therefore, be no further question that a district attorney, in representing the Government in any case in which the United States is *concerned* in any court in his district, State or Federal, is only performing his official duty, and must find his compensation within his fees and salary.

Stanton v. *United States*, 37 Fed. Rep., 252–257.
Bashaw v. *United States*, 47 Fed. Rep., 40–42.
Hillborn v. *United States*, 27 C. Cls. R., 547–555.
Perry v. *United States*, 28 C. Cls. R., 483.
Cole v. *United States*, 28 Id., 501.
Gibson v. *Peters*, 150 U. S., 342–347.
Coleman v. *United States*, 66 Fed. Rep. 905.

The claimant contends against this conclusion that the statute, § 771, requires the district attorney only to *prosecute* civil actions in which the United States is con-

cerned. That contention was dismissed by this court in the Smith Case, *supra*, page 354, as follows:

> We lay no stress upon the fact that in some of these cases the Government was interested as defendant, and that the petitioner was employed not to prosecute, but to defend, as we think the words "to prosecute all civil actions" should not be interpreted in any technical sense, but should be construed as covering any case in which the district attorneys are employed to prosecute the interests of the Government in any civil action, whether such interests be the subject of attack or of defense. This interpretation is strengthened by a reference to section 359, which authorizes the Attorney-General, whenever he deems it for the interest of the United States, to conduct and argue any case in any court of the United States in which the United States is interested, or may direct any officer of the Department of Justice to do so.

And again, on page 355 of the Smith Case, the court say:

> It can hardly be supposed that Congress could have intended that the Attorney-General should not be at liberty to call upon the official representative of the United States in each district to defend, as a part of his official duty, the interests of the Government in any suit in which it was interested.

Second.

If the services in question were not within the official duty of the claimant, the United States has not legally employed him and is under no liability to him.

Prior to 1870, when the Department of Justice was organized, heads of Executive Departments were author-

ized to employ counsel in legal proceedings and agree on their compensation, and under this authority very frequently employed district attorneys, and not infrequently they were paid, for services within their official duties, amounts not justified by the fee bill, until, in 1839, was enacted the prohibition against extra compensation, now section 1765 (5 Stat. L., 349).

That statute was promptly held to exclude district attorneys from any extra compensation in an opinion by Attorney-General Gilpin in 1840 (3 Op., 515).

Then came the fee bill of 1853, with its provision that the specified and no other compensation should be taxed and allowed to district attorneys, and that was followed by the act of 1856 making clear the official duty of district attorneys to attend to cases in which the Government was only interested but not a party, whether in State or United States courts, and to accept the fee-bill compensation therefor.

Meanwhile the authority of heads of Departments to employ counsel when they deemed necessary resulted in frequent employment and payment of district attorneys as such counsel in matters not within their duty, and was supported by the clause in fee bill of 1853, authorizing agreed compensation in such cases expressly.

In 1870, in organizing the Department of Justice (ch. 150, Laws of 1870, sec. 17, 16 Stat. L., 164), it was provided:

> SEC. 17. That it shall not be lawful for the Secretary of either of the Executive Departments to employ attorneys or counsel at the expense of the United States, etc.

Under this act of 1870 it was assumed by accounting officers, by virtue of the nonrepeal of that clause of the fee bill which authorized payment of district attorneys "for services of counsel, rendered at the request of the head of a Department, such sum as may be stipulated or agreed upon," that the authority to request of district attorneys extra services as counsel, and pay agreed compensation therefor, continued, but was transferred from the other heads of Departments to the Attorney-General—a very doubtful conclusion.

That provision for payment was dropped, however, in the Revised Statutes, taking effect December, 1873, while all the restrictive provisions of the act of 1870 were retained, carefully limiting and defining the conditions under which the Attorney-General may make the Government liable for counsel fees.

The law now contemplates that the Attorney-General and the law officers of the Department of Justice, and the district attorneys in their respective districs, shall be the counsel of the United States in all suits, litigations, and proceeding in which the United States are interested or concerned, as well in State and Territorial courts as courts of the United States. (Rev. Stat., § § 189, 359–363, 366, 367, 370, 771.)

No other officers or persons are allowed to conduct or defend suits in Federal or State courts for the Government, because the law officers above mentioned are alone charged with such duties.

Section 365 says:

> No compensation shall hereafter be allowed to any person beside the respective district attorneys and

> assistant district attorneys for service as an attorney or counselor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

In what cases "specially authorized by law" may other counsel be employed on behalf of the United States?

We answer, only in the cases provided for in sections 363 and 366 of the Revised Statutes.

Section 363 says that—

> The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct.

Section 366 says that—

> Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.

The attorneys and counsel authorized to be *retained* by sections 363 and 366 are to be *employed* only as "*assistant* attorneys" to the district attorneys, or as "*special assistants* to the Attorney-General," as the nature of the case may require; and in each case the stipulated compensation for the services of such assistant attorneys is payable "only on the certificate of the Attorney-General that the services were actually rendered, and that the same could not have been performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

As a result of these various provisions of law, it seems obvious that if the service performed in the cases in question were not within claimant's official duty he has shown no employment under the law to entitle him to compensation. No evidence is offered of any direction to claimant to appear; he seems to have done so voluntarily, thereby evidencing his understanding that his official duty required it. Neither court nor Attorney-General had any right or authority to request him to appear in cases not within his duty. The request made by either could have had no further or greater force than to express the views, in one case of the court, in the others of the Attorney-General, that the United States *was concerned* in the cases in question.

The statutes above referred to carefully limit the authority of the Attorney-General to impose liability upon the Government by the employment of attorneys or counsel, and he has no more power to employ the person who happens to be district attorney than to employ any other

individual, but is limited to the conditions imposed by the statute. None of those conditions are satisfied in this case. We can not do better on this immediate subject than to quote the language of Chief Justice Richardson in the *Smith Case* (26 C. Cls. R., 568–574, *et seq.*):

> Conceding that these services were not within the official duties of the district attorney, which it might be difficult to determine if we were required to pass upon that point, we are brought to the consideration of the questions whether or not the Attorney-General had a right by any general law to employ the claimant at all, or, employing him without an agreed compensation, what should be the measure of pay for the services performed?
>
> Under what statute was he employed by the Attorney-General? Certainly not under Revised Statutes, section 363, which authorizes the Attorney-General to employ and retain such attorneys and counselors at law as he may think necessary to *assist the district attorneys* in the discharge of their duties, since the cases occurred in his own district and he could not be employed to assist himself; nor was he retained under section 366, since he received from the head of the Department of Justice no commission as a special assistant to the Attorney-General or to some of the district attorneys, as therein required; nor under section 367, because he was not sent out of his State or district, as may be contemplated by that section, and was not an officer of the Department of Justice. This latter is apparent from section 365, which makes a distinction between district attorneys and officers of the Department of Justice.
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> But, conceding further that there was authority by general law for his employment by direction of the Attorney-General, what is the measure of his compensation?

Revised Statutes, section 1765, provides that no officer in any branch of the public service, whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

Section 365 prohibits the payment of compensation unless the Attorney-General certifies that the service could not be performed by the Attorney-General, Solicitor-General, or the officers of the Department of Justice, or by the district attorneys. That certificate the Attorney-General did not make, and could not make, because the services were in fact performed by a district attorney, and that, too, within his own district.

Mr. Comptroller Lawrence had this same question before him. He passed accounts approved by the Attorney-General for charges similar to those of the claimant, and allowed them "by force of the proviso in the act of 1874, June 20, chapter 328, section 3." That act prohibits any civil officer from receiving any compensation beyond his salary or compensation allowed by law, with this proviso, "that this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys, *as now allowed by law*, for the performance of services not covered by their salaries and fees." He held that there was no previous law providing for such employment, and that payment for such services was positively prohibited by Revised Statutes, section 1765 (18) and other sections. He found, however, that it had been the practice or custom of the

Attorney-General to approve accounts for like charges, for the accounting officer to pass them, and for the Treasury to pay the same. He regarded the proviso in the act of 1874 as recognizing and legalizing that practice or custom.

We do not so interpret the meaning of the proviso. There are extra duties for which district attorneys are allowed by law to be paid. (Rev. Stat., secs. 825, 827, 4664, and perhaps others.) These laws may have been those referred to in this proviso, which is only a saving clause to that which precedes it prohibiting extra compensation to all civil officers, with an exception by the proviso in favor of district attorneys for employment and payment "*as now allowed by law.*"

If there were an existing practice or custom to employ and pay district attorneys in cases not then allowed by law, this proviso clearly implies that it is not excepted from the preceding general prohibition.

But if Congress acted upon a mistaken understanding of the existing law, we can not see how the proviso made a new law. It was held by the Supreme Court, in *Postmaster-General* v. *Early* (12 Wheaton, 148), that "a mistaken opinion of the legislature concerning the law does not make the law," unless "the mistake is manifest from words competent to make the law for the future."

We find no words in this proviso competent to make the law for the future, as held by the Comptroller.

The act of June 20, 1874, referred to by the Chief Justice, which has been much pressed as a legislative recognition of the existence of some laws authorizing the payment of district attorneys for services not covered by fees or salary.

It should be remembered that on June 20, 1874, when said law was enacted, there was still in force and unrepealed the provision of the fee bill of 1853 authorizing payment to district attorneys agreed compensation for services as counsel rendered at the request of the head of any Executive Department, which is urged as a legal justification for the practice of such employment by the Attorney-General. But that provision was repealed by the Revised Statutes passed and approved on June 22, 1874, though when passed relating back to December, 1873.

If there is force to the claim that the continuance of that provision in the fee bill of 1853 legalized employment and payment of district attorneys, then it is true that at the moment when the act of June 20, 1874, passed there were payments "*allowed by law*" which since June 22, 1874, have not been so allowed by law.

This court disposes of the act of June 20, 1874, as only authorizing the employment of the district attorney in those cases in State courts, etc., where no fee is fixed by the fee bill, but where he receives assimilated fees under § 299 (*Smith Case, supra*, p. 355).

Third.

Any compensation paid to claimant for his services in these suits would be paid out of the appropriation for judicial expenses, and it must be included in his emolument returns and maximum.

The only compensation which the law allows to be omitted from the emolument returns of a district attorney

is the extra compensation prescribed in sections 825, 827, and 4646 of the Revised Statutes. Sections 834 and 4647 expressly provide that such compensation may be omitted from the returns.

The absence of any law authorizing the omission of such compensation as that claimed in the petition from the emolument returns of district attorneys is conclusive that it must be included in them.

We have seen that where the law contemplates the omission from these returns of any compensation received by a district attorney it says so in expréss terms. It does not in any case leave this question a doubtful one. It is conclusive always that, unless otherwise expressly provided, the compensation paid to any district attorney, whether as fees or as larger compensation, for services rendered by him as an attorney or counselor for the United States in any suit or proceeding in any court, or for any other legal service rendered as district attorney in behalf of the Government, must be included in his emolument returns.

District attorneys are required to perform many official duties for which the law has not, at least until very recently, provided any compensation beyond the salary of their office. Some of these duties are very onerous when properly and faithfully performed; for example, the duty of making up issues of appeal, etc., and the duty of examining the fee accounts of officers of the United States courts and chief supervisors of elections. (Act of Feb. 22, 1875, 18 Stat. L., 333.)

But none the less the district attorney must accept as compensation therefor the total fees and salary of his office not exceeding the maximum limited by law.

Referring to the fee bill, section 823 of the Revised Statutes says:

> The following and no other compensation shall be taxed and allowed to * * * district attorneys * * * except in cases otherwise expressly provided by law. * * *

As this prohibition excludes in the most express terms the payment of any compensation to a district attorney which is not expressly provided by law, we fail to see any power in the courts or executive branch to add to such allowances.

To quote from Mr. Attorney-General Brewster in a parallel case:

> It should require, therefore, very clear expression to justify a construction which would destroy or impair the main purpose of the * * * act.
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> * * * * *
>
> The right to compensation * * * can rise to no higher level than that of its statutory source.

(17 Op., 664, 669.)

In the *Smith Case* (*supra*, p. 356) this court summed up its views on this question by saying:

> It is essential to the interests of the Government that in all suits, criminal and civil, in which it is interested the Attorney-General shall be at liberty to call upon the district attorney to represent it, and his compensation therefor, whether measured by